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Todd S. Richardson; Richardson, Packard & Lambert; Attorneys for Appellant.
Elliot J. Williams; Alex R. Dahl; Williams & Hunt; Attorneys for Appellee.

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IN THE UTAH SUPREME COURT

93-0666-CA

DANIEL P. MORGAN,

Plaintiff/Appellant,

v.

GARY GIBBONS, M.D.,

Defendant/Appellee

Case No. [redacted]

UTAH COURT OF APPEALS
BRIEF
UTAH Priority No. 15
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BRIEF OF APPELLEE

APPEAL FROM SUMMARY JUDGMENT OF THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH, THE HONORABLE GORDON J. LOW, DISTRICT JUDGE

ELLIOTT J. WILLIAMS
ALEX R. DAHL
WILLIAMS & HUNT
257 East 200 South, Suite 500
Post Office Box 45678
Salt Lake City, Utah 84145
Telephone (801) 521-5678
ATTORNEYS FOR APPELLEE

TODD S. RICHARDSON
RICHARDSON, PACKARD & LAMBERT
510 South 600 East, Suite 100
P.O. Box 112003
Salt Lake City, Utah 84147
ATTORNEYS FOR APPELLANT

IN THE UTAH SUPREME COURT

DANIEL P. MORGAN, Plaintiff/Appellant, v. GARY GIBBONS, M.D., Defendant/Appellee	:	Case No. 930246

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Salt Lake City, Utah 84147
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LIST OF PARTIES TO THE PROCEEDING

All parties are listed in the caption of the case.

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JURISDICTION

The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3)(j) (Supp. 1993).

ISSUE PRESENTED FOR REVIEW

Did the trial court correctly grant summary judgment on the issue of informed consent to surgery where:

1. Mr. Morgan failed to show by expert testimony that the surgery Dr. Gibbons' performed carried a "substantial and significant" risk of "serious harm" -- a showing that is necessary to establish that Dr. Gibbons had a duty to disclose the risk of such harm;

2. Reasonable minds could not differ that any reasonable and prudent person in Mr. Morgan's condition would choose to undergo surgery to cure a serious and even potentially life-threatening condition after being informed of its risks and the risks of non-treatment; and

3. It is undisputed that Plaintiff executed a written consent to the surgery performed.

STANDARD OF APPELLATE REVIEW

The standard of review for this issue, is stated in *Hill v. Seattle First Nat'l Bank*, 827 P.2d 241, 246 (Utah 1992):

> We affirm a trial court's grant of a motion for summary judgment on any reasonable legal basis even if not relied upon below. *See, Zions First Nat'l Bank v. National Am. Title Ins. Co.*, 749 P.2d 651, 654 (Utah 1988); *cf. Cambelt Int'l Corp. v. Dalton*, 745 P.2d 1239, 1241-42 (Utah 1987). However, any rationale for affirming a decision must find support in the record.

DETERMINATIVE AUTHORITIES

Utah Code Ann. § 78-14-5 (1987) (attached as Appendix)

STATEMENT OF THE CASE

A. Nature of the Case

This is a medical malpractice action in which Plaintiff/Appellant Daniel P. Morgan ("Mr. Morgan") seeks damages for having developed a post-operative abscess following sinus surgery in March 1990. Mr. Morgan has stipulated that Defendant/Appellee Gary Gibbons, M.D., ("Dr. Gibbons") complied with the standard of care of a specialist in otolaryngology in the performance of the surgery and in providing post-operative care. (Appellant's Brief, p. 3.) Mr. Morgan's only remaining allegation is that Dr. Gibbons failed to obtain Mr. Morgan's informed consent to the surgery. *Id.*

B. Course of Proceedings

Mr. Morgan commenced this action on October 18, 1991. (R. 1.) On December 24, 1992, Dr. Gibbons moved for summary judgment on the grounds that Mr. Morgan's allegations were unsupported by expert testimony. (R. 61.)

C. Disposition in the Court Below

Judge Gordon J. Low entered a memorandum decision on March 24, 1991, and an order granting Dr. Gibbons' Motion for Summary Judgment on April 6, 1993. (R. 165, 168.) Mr. Morgan filed a notice of appeal on May 6, 1993. (R. 169.)

D. Statement of Relevant Facts

In October 1989, Mr. Morgan developed a sharp pain below his right eye which appeared in combination with fever and nasal congestion. When the problem persisted despite treatment at an InstaCare facility, Mr. Morgan went to Dr. Gibbons, a board certified specialist in otolaryngology. (Deposition of Daniel Morgan [hereinafter "Morgan"], R. 74 - 76; Deposition of Gary Gibbons, M.D. [hereinafter "Dr. Gibbons"], R. 89 - 90.) Dr. Gibbons prescribed antibiotics and decongestants which relieved Mr. Morgan's symptoms for a time. His symptoms, however, reoccurred in December and again in January 1990. (Morgan, R. 77 - 80.)

On January 22, 1990, Dr. Gibbons performed a physical examination and a CT scan, discovering polyps in Mr. Morgan's sinuses. The polyps appeared to be inverted papilloma, tumors which behave like a malignancy in that they invade surrounding structures, endangering the sinus bones, the eye and the brain. (Dr. Gibbons, R. 91 - 92.) The only safe alternative for treatment of Mr. Morgan's condition was surgical removal of the diseased tissue. (Dr. Gibbons, R. 93.) Dr. Gibbons explained to Mr. Morgan the dangers inherent in an inverted papilloma. Mr. Morgan, who described himself as a "reasonably compliant person," accepted Dr. Gibbons' recommendation and agreed to the surgery. (Morgan, R. 81 - 83.) Surgery was scheduled for February 28, 1990.

On February 27, 1990, the day prior to surgery, Dr. Gibbons performed another history and physical examination of Mr. Morgan. Dr. Gibbons described the technique of surgery to be used. Mr. Morgan concedes that, during that exam, Dr. Gibbons explained to him that "there is always the risk of infection" associated with the surgery, and that Dr. Gibbons answered all of his questions. (Morgan, R. 84 - 85.) After Dr. Gibbons' explanation, Mr. Morgan signed a Written Consent to Operation, Anesthesia and Other Medical Services. (R. 97; Morgan, R. 86.)

Following the operation, Mr. Morgan developed an infection in the form of a subperiosteal abscess which required surgery to drain. (Dr. Gibbons, R. 94 - 95.)

SUMMARY OF ARGUMENT

Summary judgment was appropriately rendered below because Mr. Morgan failed to produce expert testimony establishing that the surgery Dr. Gibbons performed carries a "substantial and significant risk" of causing "serious harm." Absent such testimony, Mr. Morgan cannot show that Dr. Gibbons had a duty to disclose the risk of developing the complications from which Mr. Morgan suffered. Moreover, this action is barred by the Utah Health Care Malpractice Act ("the Act") because it cannot be disputed that a reasonable person in Mr. Morgan's condition prior to surgery would opt for that treatment after being fully informed of the risks of treatment and non-treatment. Finally, the Act bars Mr. Morgan's action because the written consent

Mr. Morgan executed prior to surgery constitutes a complete defense to a claim of lack of informed consent.

ARGUMENT

POINT I.

SUMMARY JUDGEMENT WAS APPROPRIATE BECAUSE MR. MORGAN FAILED TO ESTABLISH BY EXPERT TESTIMONY THAT THE SURGERY PERFORMED CARRIES A "SUBSTANTIAL AND SIGNIFICANT RISK" OF "SERIOUS HARM."

Mr. Morgan argues that summary judgment should be reversed because a factual dispute exists concerning what risks Dr. Gibbons disclosed to Mr. Morgan prior to surgery. (Appellant's Brief, p. 8.) According to Mr. Morgan, "the critical factual issue which is hotly disputed by the parties is what disclosures of risks of the surgical procedure proposed by Dr. Gibbons were disclosed to Mr. Morgan, Ph.D." *Id.* The factual question of what risks were disclosed, however, was not relevant to summary judgment. That question would have become important only if Mr. Morgan had established what risks Dr. Gibbons had a duty to disclose. The issue before the trial court on summary judgment, therefore, was whether Mr. Morgan had any legal basis for his claim that Dr. Gibbons' breached his duty to disclose risks.

A physician's duty to disclose risks is governed by the Utah Health Care Malpractice Act ("the Act"), Utah Code Ann. § 78-14-1 to -15 (1987 & Supp. 1989). Under the Act, a plaintiff can overcome the presumption of informed consent if he or she proves, *inter alia*, that "the health care rendered carried with it a substantial and significant risk of causing the patient serious

harm," and that he or she was not informed of that risk. Utah Code Ann. § 78-14-5(1)(d),(e) (1987). Although the Act requires disclosure of "substantial and significant risks," a physician "need not advise the patient of every conceivable risk." *Reiser v. Lohner*, 641 P.2d 93, 98 (Utah 1982). Consequently, Mr. Morgan cannot establish that Dr. Gibbons had a duty to disclose the risk of a particular injury until Mr. Morgan proves that the risk of developing that injury was "substantial and significant."

A. Expert Testimony Should Be Required to Establish the Scope of a Physician's Duty to Disclose Risks.

This case poses the following question of first impression for the Utah Supreme Court: Does Utah's informed consent statute require plaintiffs to provide expert testimony to prove that the health care rendered presents a "substantial and significant risk" of "serious harm?" The Utah Court of Appeals has already indicated support for requiring such expert testimony in order to define the scope of a provider's duty to obtain an informed consent. *See, Chadwick v. Nielsen*, 763 P.2d 817, 821 n.4 (Utah App. 1988). In so doing, the Utah Court of Appeals noted that expert testimony is necessary to show that the risk of a particular harm is material. *Id.* The *Chadwick* court stated:

> The better reasoned cases from other jurisdictions hold that, at a minimum, expert testimony is required in cases alleging a lack of informed consent to prove the materiality of the risk involved.

Id. at 821, n.4.

Requiring experts to establish materiality of risks makes sense because the severity and likelihood of medical

complications are generally outside the knowledge of lay persons. It is well settled under Utah law that matters outside the knowledge and experience of lay persons must be established by expert testimony. *King v. Searle Pharmaceuticals*, 832 P.2d 858 (Utah 1992); *Butterfield v. Okubo*, 831 P.2d (Utah 1992); *Chadwick, supra*; *Hoopiiaiana v. Intermountain Health Care*, 740 P.2d 270 (Utah App. 1987); *Kim v. Anderson*, 610 P.2d 1270, 1271 (Utah 1980). The rationale for requiring expert testimony concerning such matters is identical to the reason behind requiring physician disclosure in the first place. The Washington Supreme Court explained:

> The central reason for requiring physicians to disclose risks to their patients is that patients are unable to recognize the risks by themselves. Just as patients require disclosure of risks by their physicians to give an informed consent, a trier of fact requires description of risks by an expert to make an informed decision.

Smith v. Shannon, 666 P.2d 351, 356 (Wash. 1983).

Moreover, lay factfinders need more than just a description of the risks; they also need information on the likelihood of occurrence. Clearly, whether a risk is "substantial and significant" is a function not only of severity, but also of frequency. A complication that occurs so infrequently as to pose only a remote risk of harm cannot reasonably be found to be "substantial and significant." *See, e.g., Stottlemire v. Cawood*, 213 F. Supp 897 (D.D.C. 1968) (1 in 800,000 chance of aplastic anemia does not require disclosure); *Yates v. Harms*, 393 P.2d 982 (Kan. 1964) (1.5 percent chance of losing eye does not require

disclosure); *Starnes v. Taylor*, 158 S.E.2d 339 (N.C. 1968) (1 in 250 to 1 in 500 chance of perforation of esophagus does not require disclosure). In *Smith*, the Washington Supreme Court recognized that "[o]nly a physician (or other qualified expert) is capable of judging what risks exist and their likelihood of occurrence." *Smith*, 666 P.2d at 356. As with the severity of harm, lay persons have no basis in their own experience for determining without the testimony of an expert how frequently a particular result occurs.

A clear majority of states considering this issue has concluded that expert testimony is required to sustain an informed consent claim. The inability of unaided lay persons to determine the materiality and frequency of specific medical risks has led many courts to reach that result. Typical among such decisions is *Cox v. Jones*, 470 N.W.2d. 23, 26 (Iowa 1991), in which the plaintiff, Cox, claimed damages resulting from her ophthalmologist's failure to disclose the risk of retinal detachment incident to surgical cataract removal. *Cox*, 470 N.W.2d. at 25. Cox did not introduce expert testimony on the materiality of that risk. *Id.* at 26. In upholding summary judgment in favor of the ophthalmologist, the Supreme Court of Iowa held:

> Knowledge of the nature, likelihood of occurrence, and materiality of retinal detachment certainly are not factors within the common knowledge of laypersons and require the introduction of expert evidence. Therefore, without expert evidence, plaintiffs cannot show that defendants did not inform Cox of the existence of a material risk before undergoing the cataract removal operation.

Id. Several other states have reached the same result for the same reason. *See, e.g., Bloskas v. Murray*, 646 P.2d 907, 913 (Colo. 1982) ("the substantiality of a particular risk must be determined on the basis of expert medical testimony"); *Ritz v. Florida Patient's Compensation Fund*, 436 So.2d 987, 991 (Fla. Dist. Ct. App. 1983) ("What are the accepted risks, what are foreseeable risks, what are remote and speculative risks require, in our opinion, expert testimony as a basis for determining the extent of disclosures necessary to constitute consent as 'informed.'"); *Calabrese v. Trenton State College*, 392 A.2d 600, 606 (N.J. Super. Ct. App. Div. 1978), *aff'd* 413 A.2d 315 (N.J. 1979) ("The alleged inadequacy of [a physician's] disclosure must be established by expert medical testimony because no lay jury can be expected to reach a conclusion on such a technical matter unaided by such testimony. For example, it may well be that medical practice regards the risk material to the case as being so statistically remote that, when measured by the gravity of harm to be expected from lack of such treatment, disclosure thereof is normally not made."); *Maguire v. Taylor*, 940 F.2d 375, 377 (8th Cir. 1991) ("North Dakota law provides that 'expert medical testimony is generally necessary to identify the risks of treatment, their gravity, likelihood of occurrence, and reasonable alternatives. The necessity for expert testimony is particularly so when such information is outside the common knowledge of laymen.'"); *Bearfield v. Hauch*, 595 A.2d 1320, 1321 (Pa. Super. Ct. 1991) ("The trier of fact must be supplied with

expert information as to the nature of the harm and the probability of it occurring."); *Brown v. Dahl*, 705 P.2d 781, 786 (Wash. Ct. App. 1985) ("Expert testimony is thus necessary to prove the existence of a risk, its likelihood of occurrence, and the type of harm in question."); *Canterbury v. Spence*, 464 F.2d 772, 791-92 (D.C. Cir. 1972) ("Experts are ordinarily indispensable to identify and elucidate for the factfinder the risks of therapy and the consequences of leaving existing maladies untreated."); *Small v. Gifford Memorial Hosp.*, 349 A.2d 703, 705 (Vt. 1975) ("Medical testimony is essential to establish what the risks are.").

Many other states that require expert testimony in informed consent cases do so because health care providers should be judged according to the standard of care of their professions. For good reason, those states analyze informed consent cases as they would any other medical malpractice case, following either a statutory or common law requirement that the standard of care applicable to the defendant be established by a member of defendant's specialty. For example, the Supreme Court of Minnesota has held that:

> In negligent nondisclosure cases the issue is whether the physician *should* have informed the patient of the risks involved in the procedure. Thus, the admittance of expert testimony concerning the duty of care in the applicable medical community is necessary.

Kohoutek v. Hafner, 383 N.W.2d. 295, 299 (Minn. 1986) (emphasis in original). *See also, Fain v. Smith*, 479 So. 2d 1150, 1152 (Ala. 1985) ("The legislature has adopted the traditional view

that the doctor's duty to get the informed consent of the patient must be measured by a professional medical standard."); *Fuller v. Starnes*, 597 S.W.2d 88, 90 (Ark. 1980) (requiring "expert medical testimony for the jury to determine whether a physician's failure to disclose constitutes a breach of his duty to disclose"); *Gurr v. Willcutt*, 707 P.2d 979, 985 (Ariz. Ct. App. 1985) (statute requires that "every action for medical malpractice must be proven by" expert testimony); *Sherwood v. Carter*, 805 P.2d 452, 461 (Idaho 1992) (statute requires "an objective, professional medical standard for disclosure in informed consent cases"); *Guebard v. Jabaay*, 452 N.E.2d. 751, 755 (Ill. App. Ct. 1983) ("The failure of the physician to conform to the professional standard of disclosure must be proved by expert medical evidence."); *Charley v. Cameron*, 528 P.2d 1205, 1210 (Kan. 1974) ("Expert testimony is ordinarily necessary to establish that [disclosures] were insufficient to accord with disclosures made by reasonable medical practitioners under the same or like circumstances."); *Woolley v. Henderson*, 418 A.2d 1123, 1131 (Me. 1980) ("The scope of a physician's duty to disclose is measured by those communications a reasonable medical practitioner in that branch of medicine would make under the same or similar circumstances and that the plaintiff must ordinarily establish this standard by expert medical evidence."); *Marchlewicz v. Stanton*, 213 N.W.2d. 317, 320 (Mich. Ct. App. 1973) ("The question of whether a doctor is negligent in failing to inform the patient of possible consequences of an operation is to be

determined according to the general practice of customarily followed by the medical profession in the locality."); *Cress v. Mayer*, 626 S.W.2d. 430, 436-37 (Mo. Ct. App. 1981) (requiring "expert testimony to show what disclosures a reasonable medical practitioner, under the same or similar circumstances, would have made"); *Turek v. St. Elizabeth Community Health Center*, 488 N.W.2d. 567, 572 (Neb. 1992) ("Expert testimony is required to prove the standard of care in an informed consent case."); *Smith v. Cotter*, 810 P.2d 1204, 1207 (Nev. 1991) ("The physician's duty to disclose is measured by a professional medical standard, which the plaintiff must establish with expert testimony."); *Tiedemann v. Radiation Therapy Consultants*, 701 P.2d 440, 447 (Or. 1985) ("What additional information should have been given is a matter for expert testimony."); *Karp v. Cooley*, 493 F.2d 408, (5th Cir. 1974) ("The Texas standard against which a physician's disclosure or lack of disclosure is tested is a medical one which must be proved by expert medical evidence."); *Royal v. Bell*, 778 P.2d 108, 112 (Wyo. 1989) ("Expert testimony is required to establish what a reasonable practitioner would disclose in the same or similar circumstances.").

Under either rationale -- materiality of risk or standard of care -- the requirement of expert testimony makes particular sense when applied to the case at bar. The operation performed by Dr. Gibbons, a Caldwell-Luc procedure, is not familiar to lay persons. The nature of the various risks posed by that procedure, and their frequency of occurrence, are likewise

unknown to lay persons. Similarly, people who do not perform Caldwell-Luc procedures are unfamiliar with the standard of care otolaryngologists follow when determining which risks are material and therefore warrant disclosure. Consequently, a finder of fact deciding this case in the absence of expert testimony would have no basis for a verdict other than mere speculation and conjecture. Such a groundless verdict is impermissible. *Anderson v. Nixon*, 104 Utah 2d 262, 139 P.2d 220 (1943); *Hoopiiaiana*, *supra*. The requirement of expert testimony is therefore appropriately applied to the case at bar.

B. Utah Case Law Does Not Support Mr. Morgan's Assertion That Expert Testimony is Optional in This Case.

Mr. Morgan argues that expert testimony is unnecessary in informed consent cases. (Appellant's Brief, pp. 11 - 14.) His argument, however, is not supported by the cases upon which he relies: *Ficklin v. MacFarlane*, 550 P.2d 1295 (Utah 1976) and *Canterbury v. Spence*, 464 F.2d 772 (D.C.Cir.), *cert. denied*, 409 U.S. 1064 (1972). (Appellant's Brief, p. 12.) Both *Ficklin* and *Canterbury* acknowledge the subtle but critical distinction that Mr. Morgan misses: lay persons can determine whether a provider breached a duty of disclosure only after expert testimony defines the scope of that duty. The *Ficklin* court held that expert testimony is optional only with respect to whether a provider breached the duty; it did not hold that lay testimony is sufficient to determine what risks are material and therefore should be disclosed. *Ficklin* at 298. Similarly, the *Canterbury* court did not require expert testimony to assist the fact

finder's determination of "the reasonably, expectable effect of risk disclosure on the [patient's] decision" about treatment. *Canterbury*, *supra*, at 792. But *Canterbury* held that "[e]xperts are ordinarily indispensable to identify and elucidate for the factfinder the risks of therapy and the consequences of leaving existing maladies untreated." (*Id.*)

This two-part distinction from *Canterbury* was clearly explained in *Smith v. Shannon*, 666 P.2d 351 (Wash. 1983):

> The determination of materiality is a 2-step process. Initially, the scientific nature of the risk must be ascertained, *i.e.*, the nature of the harm which may result and the probability of its occurrence. *See*, *Canterbury v. Spence*, *supra* at 787 - 88. [Other citations omitted.] The trier of fact must then decide whether the probability of that type of harm is a risk which a reasonable patient would consider in deciding on treatment.
>
> While the second step of this determination of materiality clearly does not require expert testimony, the first step almost as clearly does . . . . [E]xpert testimony is necessary to prove the existence of a risk, its likelihood of occurrence, and the type of harm in question.

Smith, 666 P.2d at 356. Properly understood, therefore, *Canterbury* and *Ficklin* do not relieve Mr. Morgan of the burden to produce expert testimony to establish the materiality of the risk; *i.e.*, which ones are "substantial and significant." Rather, they support the Utah Court of Appeals' statement in *Chadwick* that expert testimony is mandatory on the issue of whether the risks of sinus surgery were substantial and significant. *See*, *Chadwick v. Nielsen*, 763 P.2d 817, 821 n.4 (Utah App. 1988).

For separate reasons, Plaintiff's burden to establish the materiality of risk by expert testimony is not excused by the Utah Supreme Court's holding in *Nixdorf v. Hicken*, 612 P.2d 348 (Utah 1980). The dispute in *Nixdorf* concerned a physician's duty to inform his patient that a needle had been left inside her during surgery. This Court in *Nixdorf* found no need for expert testimony to define the scope of a physician's duty to disclose information material to the patient's physical condition after surgery. *Nixdorf* at 354. In doing so, however, the Court made clear that "[t]he present situation differs from that found in the informed consent context and our approach to it must reflect this difference." (*Id.*, n.4.) The Court therefore did not apply the informed consent provisions of the Utah Health Care Malpractice Act which require physicians to disclose only those risks of serious harm that are "substantial and significant." *See* Utah Code Ann. § 78-14-5(1)(d),(e) (1987). Furthermore, this Court in *Nixdorf* found that the underlying negligence issue did not require expert testimony because leaving a surgical instrument in the body was a result such that "people would know from common knowledge and experience it is more probably than not the result of negligence." *Id.* at 353. *Nixdorf* is not analogous to the case at bar because it concerned matters within the knowledge and experience of lay persons, because it was not decided under the informed consent statute, and because it dealt with a duty to disclose information about a patient's condition rather than the duty to disclose a risk prior to surgery.

Therefore *Nixdorf* does not establish the standard for expert testimony relevant to the issues presented in this case.

C. <u>This Court Should Not Consider Mr. Morgan's Argument that Dr. Gibbons' Testimony Establishes a *Prima Facie* Case Because That Argument is Unsupported by Citations to the Record.</u>

Mr. Morgan asserts on appeal that he "intended to use, for purposes of establishing his ***prima facie*** case, testimony of Dr. Gibbons with respect to whether the health care he rendered carried with it a substantial and significant risk of causing the patient serious harm." (Appellant's Brief, p. 14.) In doing so, Mr. Morgan paraphrases Dr. Gibbons' testimony without citing to the record. (*Id.* at 14 - 15.) The portion of Dr. Gibbons' testimony that Mr. Morgan claims he "intended to use" is not even part of the record. (Appellant's Brief, p. 14; R. 1 - 173.) This Court should not accept Mr. Morgan's interpretation of Dr. Gibbons' testimony because an appellate court should "only consider those facts properly cited to and supported by the record." *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 957 (Utah App. 1989). *See also, Koulis v. Standard Oil*, 746 P.2d 1182 (Utah App. 1987) (*quoting Uckerman v. Lincoln Nat'l Life Ins. Co.*, 588 P.2d 142, 144 (Utah 1978)).

The propriety of summary judgment is not affected by any dispute over what risks Dr. Gibbons disclosed to Mr. Morgan. Rather, the summary judgment concerned whether Mr. Morgan established the scope of Dr. Gibbons' duty to disclose by demonstrating that the surgery performed carried "substantial and significant risks of causing the patient serious harm." Because

Mr. Morgan offered no expert testimony establishing that the Caldwell-Luc procedure carried such risks, the trial court correctly ruled that Mr. Morgan had failed as a matter of law to establish a *prima facie* case.

POINT II.

IT IS UNDISPUTED THAT A REASONABLE, PRUDENT PERSON IN MR. MORGAN'S CONDITION, KNOWING THE RISKS OF TREATMENT AND NON-TREATMENT, WOULD CHOOSE SURGERY.

The Utah Health Care Malpractice Act presumes informed consent. Utah Code Ann. § 78-14-5(1) (1987). According to the Act, "[w]hen a person submits to health care by a health care provider, it shall be presumed that what the health care provider did was expressly or impliedly authorized to be done." Utah Code Ann. § 78-14-5(1) (1987). In order to overcome that presumption, a plaintiff must prove, *inter alia*, that "a reasonable, prudent person in the patient's position would not have consented to the health care rendered after having been fully informed as to all facts relevant to the decision to give consent." Utah Code Ann. § 78-14-5(1)(f) (1987). Mr. Morgan has failed to make this showing. In fact, in neither his memorandum opposing summary judgment nor his Appellant's Brief does Mr. Morgan even assert that a reasonable person in his position would forego treatment. (R. 126 - 27; Appellant's Brief, 17 - 20.) It is therefore not surprising that the trial court, after reviewing the risks of treatment and non-treatment supplied by Dr. Gibbons and noting the complete absence of evidence to the contrary, concluded that

"it is indisputable that a reasonable person in the plaintiff's circumstances would have consented to the surgery." (R. 162.)

The trial court had good reasons for determining that a jury hearing Dr. Gibbons' description of Mr. Morgan's situation -- and no expert evidence to the contrary -- would find that a reasonable person in Mr. Morgan's situation would choose surgery. Mr. Morgan's circumstances prior to the operation were as follows: Dr. Gibbons had correctly concluded that Mr. Morgan probably had an inverted papilloma in his sinus.[1/] Inverted papilloma is a disease that spreads like a malignant tumor. (R. 91 - 92.) It can affect the bones of the sinus and the tissues of the eye, the optic nerve, and the brain. (*Id.*) Surgery is the only treatment that can prevent inverted papilloma from causing the loss of Mr. Morgan's eye and possible brain damage. (*Id.*) Passive observation was not an option because of the virtual assurance that bone and tissue would be destroyed, and the possibility that progress into the eye and brain could cause death. The risk that Mr. Morgan faced -- a small percentage chance of an infection, additional surgery or even minor visual disturbance -- pales in comparison. A reasonable person balancing the small chance of surgical damage with the strong likelihood of a catastrophic course of disease would not forsake the only treatment available.

[1/]Because Mr. Morgan has conceded that summary judgment was properly granted on the standard of care issues (Appellant's Brief, pp. 7-8), it is undisputed that Dr. Gibbons' diagnosis was correctly made.

Because the evidence concerning the risks of treatment and non-treatment were compelling and undisputed, the trial court acted within its discretion when ruling as a matter of law that a reasonable person in Mr. Morgan's condition would choose surgery despite being informed of its risks. "[W]hen the moving party has presented evidence sufficient to support a judgment in its favor, and the opposing party fails to submit contrary evidence, a trial court is justified in concluding that no genuine issue of fact is present or would be at trial." *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah App. 1989). Furthermore, when reasonable minds could not differ, a trial court has the prerogative of determining that there is no genuine issue left for a jury to decide. *Polycoat Corp. v. Holcomb*, 591 P.2d 449 (Utah 1979) (*quoting Coronado Mining Corp. v. Marathon Oil*, 577 P.2d 957 (Utah 1978)). The trial court's summary judgment in this case comports with a New York appellate decision where a plaintiff failed to present expert testimony establishing the materiality of risk. *See*, *Hylick v. Halweil*, 492 N.Y.S.2d 57 (N.Y. App. Div. 1985). The *Hylick* court upheld a trial court's dismissal because the absence of expert testimony on the materiality of risks left the factfinder without any basis to determine what a reasonable person would choose. *Id.* at 59. According to the *Hylick* court:

> Assuming, arguendo, that the testimony of plaintiff and her expert was sufficient to constitute a *prima facie* showing of qualitative insufficiency of consent, plaintiff was still required to establish, *inter alia*, that a "reasonably prudent person in the patient's position would not have undergone the treatment or

> diagnosis if he had been fully informed." [Citations omitted.] Such a determination would necessarily require the fact-finder to balance the risks associated with having the procedure performed, against the risks associated with foregoing it. This record is devoid of any evidence upon which a fact-finder could give a non-speculative answer to that question, and the cause of action was therefore properly dismissed. [Citations omitted.]

Id. Like the plaintiff in *Hylick*, Mr. Morgan has failed to present any evidence which, if shown to a factfinder, would support a finding that a reasonable person in his position would opt to let inverted papilloma run its course untreated. (R. 120 - 29.) The argument that a reasonable and prudent person would do so is simply untenable. The trial court therefore acted appropriately by holding that a factfinder reviewing all the evidence presented must conclude that a fully informed, reasonable, prudent person in Mr. Morgan's position would have consented to surgical removal of the inverted papilloma.

After a trial court determines that reasonable minds could not differ on a factual issue, then, "[o]n appeal, it is appellant's burden to convince this Court that the trial court exceeded its authority." *Polycoat, supra*. Mr. Morgan cannot carry that burden because there is neither an assertion nor a scintilla of evidence in the record contradicting Dr. Gibbons' testimony that inverted papilloma is a very dangerous condition which requires surgical intervention. (*See*, R. 91-93.) Consequently, this Court should affirm the trial court's judgment.

Rather than discussing what a reasonable person in his circumstance would choose, Mr. Morgan contends that the trial court erred by not considering Mr. Morgan's subjective state of mind. (Appellant's Brief, pp. 17 - 18.) Mr. Morgan asserts:

> Judge Low categorically rejected the testimony of Mr. Morgan, Ph.D., including the testimony given to Judge Low at the conclusion of oral arguments by Mr. Morgan, Ph.D., himself, that he would not have proceeded with the surgery had the risks of the complication he experienced been disclosed to him. That testimony is discounted 100% by Judge Low in his ruling.

Id. Furthermore, Mr. Morgan argues that the trial court should be reversed in order to allow a factfinder to hear evidence on Mr. Morgan's state of mind:

> Mr. Morgan, Ph.D., submits that in claims based on lack of informed consent, that a jury trial is required to allow the "finder of fact" to evaluate the claimant's state of mind and whether he would have indeed consented to surgery, at the time immediately before the surgery when appropriate disclosures were not made. Such a jury would need to consider Mr. Morgan, Ph.D.'s testimony, and perhaps the testimony of other lay witnesses, which would address Mr. Morgan, Ph.D.'s state of mind as of the time he made the decision to consent to the surgery . . . .

(Appellant's Brief, p. 19.)

It was not error, however, for the trial court to disregard Mr. Morgan's state of mind. The question before the court was whether "a reasonable, prudent person in the patient's position" would have consented to surgery despite being fully informed of the risks. Utah Code Ann. § 78-14-5(1)(f) (1987). This is an objective standard, not a subjective one. The trial court properly disregarded Mr. Morgan's subjective state of mind when determining that a reasonable person in Mr. Morgan's position

would opt for surgery. The factfinder's need to hear testimony about Mr. Morgan's state of mind therefore is not a valid ground for reversal of summary judgment.

Mr. Morgan also argues that the trial court should define the materiality of risks only after knowing the actual outcome of the surgery. (Appellant's Brief, p. 18.) The Act, however, establishes that the proper time to judge the materiality of risks for the purpose of informed consent is "before health care was provided and before the occurrence of any personal injuries alleged to have arisen from said health care." Utah Code Ann. § 78-14-5(1)(f) (1987). According to Mr. Morgan:

> [T]he risks claimed to have been disclosed by Dr. Gibbons with respect to not taking any action proved to be false, while the risk of disruption of the bony medial wall between the ethmoid sinus and the orbit of the eye proved to be a very real risk for Mr. Morgan, Ph.D.

(Appellant's Brief, p. 18.) Mr. Morgan's reading of the Act would require providers to inform patients of every risk that occurs rather than only the "substantial and significant" risks of serious harm that could occur. Mr. Morgan's interpretation of the Act is incompatible with the clear language of the statute and with the holding in *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982), which establish a duty only as to "substantial and significant" risks as viewed prior to surgery. Mr. Morgan's argument, therefore, does not state a grounds for reversing the trial court's ruling.

The trial court correctly held that a factfinder hearing the undisputed testimony of Dr. Gibbons would decide that a fully

informed, reasonable person in Mr. Morgan's position prior to surgery would choose surgical treatment. Because this issue was undisputed, because the substance of Dr. Gibbons' testimony is compelling, and because the trial court applied the correct standards, the summary judgment should be upheld.

POINT III.

SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE IT IS UNDISPUTED THAT MR. MORGAN EXECUTED A WRITTEN CONSENT TO THE SURGERY THAT WAS PERFORMED.

Under the Utah Health Care Malpractice Act ("the Act"), a written consent is a complete defense to an allegation of lack of informed consent. Utah Code Ann. § 78-14-5(2) (1987). The Act provides that "it shall be a defense to any malpractice action . . . based upon alleged failure to obtain informed consent if:

> (e) the patient or his representative executed a written consent which sets forth the nature and purpose of the intended health care and which contains a declaration that the patient accepts the risk of substantial and serious harm, if any, in hopes of obtaining desired beneficial results of health care and which acknowledges that health care providers involved have explained his condition and the proposed health care in a satisfactory manner and that all questions asked about the health care and its attendant risks have been answered in a manner satisfactory to the patient or his representative; such written consent shall be a defense to an action against a health care provider based upon failure to obtain informed consent unless the patient proves that the person giving the consent lacked capacity to consent or shows by clear and convincing proof that the execution of the written consent was induced by the defendant's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.

Utah Code Ann. § 78-14-5(2) (1987).

Mr. Morgan executed a written consent prior to undergoing the sinus surgery. (*See*, R. 97.) In that consent, Mr. Morgan acknowledged that he was authorizing the performance of the surgery and that "the nature and purpose of the operation, possible alternative methods of treatment and the possibility of complications" had been "fully explained" to him. (*Id.*) Mr. Morgan makes no claim that he lacked the capacity to consent to treatment or that Dr. Gibbons obtained the consent through

fraud or misdeed of any kind. (R. 120 - 129; Appellate Brief, pp. 1 - 23.)

Mr. Morgan's written consent satisfies the Act's requirements even though it does not precisely parrot the statutory language. The Legislature determined, as a matter of public policy, that a written acknowledgement of an informed consent discussion, without a written recitation of specific risks, is sufficient as a matter of law to establish a patient's consent to health care. Because Mr. Morgan executed a written consent, his claim against Dr. Gibbons based on lack of informed consent is without basis.

CONCLUSION

The trial court correctly concluded that Mr. Morgan failed to sustain his claim that he did not give informed consent to surgery. Mr. Morgan did not overcome the Utah Health Care Malpractice Act's presumption of consent because he failed to show by expert testimony that the surgery he underwent posed a "substantial and significant risk" of "serious harm." Dr. Gibbons' testimony cannot now carry Mr. Morgan's burden to establish a *prima facie* case because the testimony Mr. Morgan "intended to use" is not in the record on appeal. Furthermore, it is undisputed that a reasonable person in Mr. Morgan's position would have chosen to undergo surgery despite its risks. Finally, it is undisputed that Mr. Morgan executed a written consent after Dr. Gibbons explained the surgery to him and answered all of his questions. These undisputed facts

demonstrate that Mr. Morgan has failed as a matter of law to establish a legal basis for recovery against Dr. Gibbons. Therefore, Dr. Gibbons respectfully requests this Court to affirm the trial court's summary judgment.

RESPECTFULLY SUBMITTED this 25TH day of October, 1993.

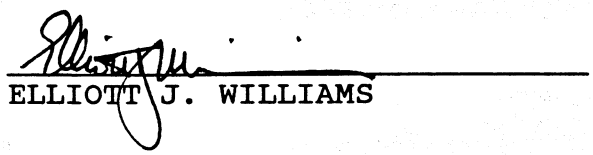
WILLIAMS & HUNT

By: _____

ELLIOTT J. WILLIAMS
ALEX R. DAHL
Attorneys for
Defendant/Appellee
Gary Gibbons, M.D.

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing Brief of Appellee, were mailed postage prepaid thereon, by First Class mail in the United States Mail, to Todd S. Richardson, Richardson, Packard & Lambert, 510 South 600 East, Suite 100, Post Office Box 112003, Salt Lake City, Utah 84147.



ELLIOTT J. WILLIAMS

Appendix A

78-14-5. Failure to obtain informed consent — Proof required of patient — Defenses — Consent to health care.

(1) When a person submits to health care rendered by a health care provider, it shall be presumed that what the health care provider did was either expressly or impliedly authorized to be done. For a patient to recover damages from a health care provider in an action based upon the provider's failure to obtain informed consent, the patient must prove the following:

(a) that a provider-patient relationship existed between the patient and health care provider; and

(b) the health care provider rendered health care to the patient; and

(c) the patient suffered personal injuries arising out of the health care rendered; and

(d) the health care rendered carried with it a substantial and significant risk of causing the patient serious harm; and

(e) the patient was not informed of the substantial and significant risk; and

(f) a reasonable, prudent person in the patient's position would not have consented to the health care rendered after having been fully informed as to all facts relevant to the decision to give consent. In determining what a reasonable, prudent person in the patient's position would do under the circumstances, the finder of fact shall use the viewpoint of the patient before health care was provided and before the occurrence of any personal injuries alleged to have arisen from said health care; and

(g) the unauthorized part of the health care rendered was the proximate cause of personal injuries suffered by the patient.

(2) It shall be a defense to any malpractice action against a health care provider based upon alleged failure to obtain informed consent if:

(a) the risk of the serious harm which the patient actually suffered was relatively minor; or

(b) the risk of serious harm to the patient from the health care provider was commonly known to the public; or

(c) the patient stated, prior to receiving the health care complained of, that he would accept the health care involved regardless of the risk; or that he did not want to be informed of the matters to which he would be entitled to be informed; or

(d) the health care provider, after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent to which risks were disclosed, if the health care provider reasonably believed that additional disclosures could be expected to have a substantial and adverse effect on the patient's condition; or

(e) the patient or his representative executed a written consent which sets forth the nature and purpose of the intended health care and which contains a declaration that the patient accepts the risk of substantial and serious harm, if any, in hopes of obtaining desired beneficial results of health care and which acknowledges that health care providers involved have explained his condition and the proposed health care in a satisfactory manner and that all questions asked about the health care and its attendant risks have been answered in a manner satisfactory to the patient or his representative; such written consent shall be a defense to an action against a health care provider based upon failure to obtain informed consent unless the patient proves that the person giving the consent lacked capacity to consent or shows by clear and convincing proof that the execution of the written consent was induced by the defendant's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.

(3) Nothing contained in this act shall be construed to prevent any person eighteen years of age or over from refusing to consent to health care for his own person upon personal or religious grounds.

(4) The following persons are authorized and empowered to consent to any health care not prohibited by law:

(a) any parent, whether an adult or a minor, for his minor child;

(b) any married person, for a spouse;

(c) any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his care and any guardian for his ward;

(d) any person eighteen years of age or over for his or her parent who is unable by reason of age, physical or mental condition, to provide such consent;

(e) any patient eighteen years of age or over;

(f) any female regardless of age or marital status, when given in connection with her pregnancy or childbirth;

(g) in the absence of a parent, any adult for his minor brother or sister; and

(h) in the absence of a parent, any grandparent for his minor grandchild.

(5) No person who in good faith consents or authorizes health care treatment or procedures for another as provided by this act shall be subject to civil liability. 1976

78-14-6. Writing required as basis for liability for breach of guarantee, warranty, contract or assurance of result.

No liability shall be imposed upon any health care provider on the basis of an alleged breach of guarantee, warranty, contract or assurance of result to be obtained from any health care rendered unless the guarantee, warranty, contract or assurance is set forth in writing and signed by the health care provider or an authorized agent of the provider. 1976

78-14-7. Ad damnum clause prohibited in complaint.

No dollar amount shall be specified in the prayer of a complaint filed in a malpractice action against a health care provider. The complaint shall merely pray for such damages as are reasonable in the premises. 1976

78-14-7.1. Limitation of award of noneconomic damages in malpractice actions.

In a malpractice action against a health care provider, an injured plaintiff may recover noneconomic losses to compensate for pain, suffering, and inconvenience. In no case shall the amount of damages awarded for such noneconomic loss exceed $250,000. This limitation does not affect awards of punitive damages. 1986

78-14-7.5. Limitation on attorney's contingency fee in malpractice action.

(1) In any malpractice action against a health care provider as defined in Section 78-14-3, an attorney